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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. [redacted] 55

THE DRUG AND CHEMICAL CLUB OF NEW YORK,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 797

THE DRUG AND CHEMICAL CLUB OF NEW YORK,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Drug and Chemical Club of New York prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled cause.

Opinion Below

The opinion of the Court of Claims (R. 17) is reported in — Ct. Cl. —.

Jurisdiction

The judgment of the Court of Claims was entered on December 5, 1949 (R. 18). An order of said court overruling plaintiff's motion for a new trial was entered on February

6, 1950 (R. 18). The jurisdiction of this court is invoked under 28 U. S. C. Section 1255 (1).

Question Presented

Is the petitioner, The Drug and Chemical Club of New York, a "social" club or organization within the meaning of Section 1710 of the Internal Revenue Code, so as to be subject to the tax on dues and initiation fees imposed by said section on any "social, athletic, or sporting club or organization, . . ."

Statutes and Regulations Involved

The text of the applicable provisions of the Statutes and Regulations involved is set forth in the Appendix, *infra*, pp. 10-12.

Summary Statement of the Matter Involved

Petitioner herein is a corporation organized under the laws of the State of New York in 1894 (R. 6).

In 1928 and 1929, the Commissioner of Internal Revenue allowed a refund to petitioner of taxes theretofore paid for the period 1924 to 1928 inclusive on the dues and initiation fees of its members pursuant to Section 501 of the Revenue Act of 1926. The latter section is similar to the section here involved (R. 6). Thereafter, no demand for taxes was made on petitioner until 1942 (R. 6) at which time petitioner was required by the Commissioner of Internal Revenue to collect and pay over the tax imposed by Section 1710 of the Internal Revenue Code. Petitioner thereupon collected and paid over the taxes, imposed by the aforesaid Section, for the period January 1943 to December 1946 (R. 7). On January 7, 1947, petitioner duly filed a claim for refund thereof (R. 7).

There had been no material change in the purpose or character of petitioner's activities or facilities from 1924

to 1946 inclusive (R. 8).[1] These activities and facilities are as follows:

Petitioner is located in the center of the insurance business in New York (R. 10), occupying a portion of the building owned and likewise occupied by the National Board of Fire Underwriters, of which practically all of the stock fire insurance companies operating throughout the United States are members (R. 10). Of petitioner's 650 resident members, 534 are engaged in the insurance business, 70 in the drug and chemical business, and 46 in miscellaneous related businesses (R. 16). Many of the fire insurance executives throughout the United States are non-resident members of the club (R. 10). In passing on applications for membership, the Board of Governors considers the applicant's position in the industry and his position in the company with which he is connected (R. 9). Members utilize the club as a meeting place with associates to transact business or to continue business discussions during luncheon periods (R. 16). In some instances, members who are in the same specialized branch of insurance customarily sit at the same table (R. 16). The club is used extensively for conferences and meetings to deal with insurance company problems and to promote the welfare of the industry (R. 16). The club is used regularly for meetings held to deal with industry problems by insurance groups, insurance committees, insurance organizations and insurance trade associations (R. 16). Among the typical industry-wide insurance groups holding regularly scheduled business meetings in the private dining rooms are the Automobile

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[1] The service of drinks was added after the repeal of Prohibition (R. 8). As to the lack of materiality thereof, see *Merchants Club* v. *United States*, 106 Ct. Cl. 562, in which the service of drinks (106 Ct. Cl. at pp. 566, 568) ater repeal did not affect the Court of Claims' finding that "there was no change in its character or activities between 1928 and 1943" (106 Ct. Cl. at p. 563).

Underwriters Association, the Inland Marine Underwriters Association, the Inland Marine Loss Group, the Casualty Managers Association, Automobile Casualty Underwriters Association, the Reinsurance Clearing House, the Claims Conference, the Surety Managers Group, the Insurance Section of the New York Board of Trade, and the National Board of Fire Underwriters and its various committees (R. 17). While the principal activity of the club is during the luncheon period, meetings and discussions are also carried on at other times (R. 17), the petitioner being open from 9 A. M. to 6 P. M. on business days of the week (R. 13). Petitioner is not open in the evening and does not provide breakfast or dinner (R. 13). The ladies who attend the club are usually business associates of members or customers of members (R. 13). Their average attendance is five a day (R. 13) out of approximately four hundred luncheons served (R. 12). The petitioner has no game or recreational facilities nor, apart from newspapers, any non-technical reading material, its reading matter consisting of only insurance reference books and trade periodicals (R. 11).

Petitioner's claim for refund of the taxes collected for the period in suit not having been acted upon by the Commissioner of Internal Revenue within the period prescribed by law, petitioner brought an action for refund in the Court of Claims (R. 4).

The Court of Claims heard and decided petitioner's case on the same day that it decided the case of *Bankers Club of America* v. *United States*, No. 48513, Dec. 5, 1949, — Ct. Cl. —, 87 F. Supp. 253, (R. 17), a case involving the applicability of the identical statute. In its opinion with respect to the petitioner herein, the Court of Claims summarily stated that "the facts of (petitioner's) . . . case are substantially the same" as those in the *Bankers Club* case

and on authority of its decision in the latter case, this petitioner's claim was dismissed (R. 17).

Petitioner prays this court for a writ of certiorari because it believes that the opinion of the Court of Claims is erroneous in holding that petitioner's facts are the same as those in the *Bankers Club* case, *supra,* and that petitioner's taxable status is governed by the decision in the latter case.

Reasons for Granting the Writ

It is respectfully urged that this court grant plaintiff's petition for the following reasons:

1. The decision of the Court of Claims in this case is in conflict with its decision in *Merchants Club* v. *United States, supra,* and is based upon an erroneous application to this petitioner of its decision in *Bankers Club of America* v. *United States, supra.*

2. Unless this petition is granted, the petitioner herein is being unjustly held subject to a tax with respect to which others similarly situated are held to be exempt, not only by the Court of Claims, but by other federal courts which have passed on the question.

At the present time, the petitioner stands subject to tax on the ground that its facts are substantially the same as those of the Bankers Club (R. 17) (*Bankers Club of America* v. *United States, supra*). At the same time, another club (the Merchants Club) stands exempt from the identical tax, the Court of Claims having, in its *Bankers Club* opinion, reiterated the correctness of its decision in *Merchants Club* v. *United States, supra,* decided in 1946. An examination of the latter opinion demonstrates that the facts of petitioner's case are substantially the same as those in the *Merchants Club* case. Furthermore, this essential sameness exists with respect to the very facts which the Court of Claims has selected as being legally operative to distinguish the *Merchants Club* case from that of the *Bankers Club.*

These distinguishing features rest upon the close connection between the former club and the particular business (cotton textile selling) which is served by it. The petitioner herein bears a similarly close connection with the insurance industry which it likewise serves in precisely the same manner. Both clubs serve as a meeting place for executives and others of similar rank in their respective industries where matters of common business interest are discussed and official meetings are held to deal with problems affecting their particular industry and its welfare. Both clubs are similarly located, one in the heart of the textile merchandising area of New York and the other in the center of the insurance industry, and both have an almost identical proportion of membership engaged in the industry with which each is connected.[2]

On the other hand, according to the findings of fact in the *Bankers Club* case, *supra*, the Bankers Club is located in a general office building with a miscellaneous occupancy in the downtown business area of New York; its membership is not predominantly made up of bankers or any other single group but is drawn from many businesses and professions; it does not provide a central meeting place for official trade groups engaged in the same line of business; it is utilized by separate business firms and corporations (see Finding 24) engaged in differing occupations, to hold private meetings of their own particular firm or corporation and lacks the trade association aspects which characterize the "indus-

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[2] In the Merchants Club, 375 out of 484 members (77.4%) were engaged in the cotton textile business (*Merchants Club* v. *United States*, *supra*, 106 Ct. Cl. at p. 570); in the case of petitioner, 534 out of 650 members (82.1%) are engaged in the insurance industry (R. 16). Both clubs have a small number of members engaged in other industries, the Merchants Club having a small group of hardware members, taken in during the depression period (106 Ct. Cl. at pp. 569, 570), and the petitioner having a small group of drug members, whose presence is based upon the historical origins of the club, the insurance industry having taken over the area occupied by the club which at one time had been the center of the drug and chemical trade (R. 10).

try-wide" (R. 16) groupings of petitioner and the Merchants Club. Thus the Court of Claims, in the *Bankers Club* case, correctly stated:

> "This case differs from *Merchants Club v. United States,* 106 C. Cls. 562, in that that club was maintained *primarily* for the benefit of people engaged in the same line of endeavor . . ." (italics ours) (— Ct. Cl. at p. —; 87 F. Supp. at p. 254).

Similarly, petitioner's case differs from the *Bankers Club* case in that petitioner is likewise maintained primarily for the benefit of persons engaged in the same line of endeavor; consequently, the court below erred in holding that petitioner's case was the same as that of the Bankers Club.

Whether or not the Bankers Club should have been distinguished from and treated differently for tax purposes from the Merchants Club is not before this court. The only question to be decided here is whether or not, a distinction based on the homogeneity of membership having been recognized and affirmed by the Court of Claims on the very day on which it rendered its decision with respect to petitioner, an error was committed by said court in holding that the petitioner is not to be treated taxwise in the same manner as is the Merchants Club.

The distinction between organizations such as the Merchants Club and those such as the Bankers Club has likewise been recognized by the Court of Claims in *Builders Club* v. *United States,* 74 Ct. Cl. 595 (building trades) and by other federal courts in *Krug* v. *Rasquin,* 21 F. Supp. 866 (baking industry), and *Furniture Club of America* v. *United States,* 67 F. Supp. 764 (furniture industry). In all of the foregoing cases, in which the club was held to be non-social, there existed certain common facts such as service of food and drink, operation on a membership plan, conversation on a variety of topics in addition to business, which were

likewise present in clubs held to be taxable (such as *Duquesne Club* v. *United States*, 87 Ct. Cl. 483, and *Bankers Club* v. *United States, supra*). The basic error committed here was that the court below selected facts which were present in both taxable and non-taxable organizations as the basis for its conclusion that the petitioner's facts were similar to those of the Bankers Club. In so doing, facts based on the homogeneity of the business served, which distinguished petitioner as well as the Merchants Club from the Bankers Club, were overlooked and petitioner's status was determined on the basis of a legally immaterial similarity between it and the Bankers Club.

The primary facts with respect to petitioner and the other cases cited above dealing with clubs serving a particular business are virtually identical and their similarity is not obscured by certain conclusionary characterizations which may have been used in certain of the opinions cited. It is submitted that an organization devoted to the welfare of the insurance industry, composed of executives in that industry, where meetings are constantly held relative to its problems, should be characterized as a business or "commercial" club, (see Treasury Regulation 43 sec. 101.25, quoted *infra* at p. 12), and entitled to the same treatment as the clubs which in precisely the same manner serve the cotton textile industry (*Merchants Club* v. *United States, supra*), the building industry (*Builders Club* v. *United States,* supra), the furniture industry (*Furniture Club of America* v. *United States, supra*), and the baking industry (*Krug* v. *Rasquin, supra*).

Conclusion

Petitioner's status within the meaning of Section 1710 of the Internal Revenue Act is governed by the decision of the Court of Claims in *Merchants Club* v. *United States, supra,* and on the authority of that case petitioner is legally entitled to a decision in its favor.

It is, therefore, respectfully submitted that petitioner's prayer for a writ of certiorari should be granted.

Dated: May 2, 1950.

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APPENDIX

Internal Revenue Code:

Sec. 1710. Tax.

(a) (As amended by Section 543(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687) Rate—There shall be levied, assessed, collected, and paid—

(1) Dues or Membership Fees.—A tax equivalent to 11 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

(2) Initiation Fees.—A tax equivalent to 11 per centum of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

* * * * * * *

(b) By Whom Paid.—The taxes imposed by subdivision (a) shall be paid by the person paying such dues or fees, or holding such life membership. (26 U. S. C. 1946 ed., Sec. 1710).

Section 1650 of the Internal Revenue Code, added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, was amended by Section 302(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, to increase the rate of tax to 20 per cent effective April 1, 1944.

Sec. 1712. Definitions.

As used in this subchapter—

(a)(As amended by Section 543(a) of the Revenue Act of 1941, supra) Dues.—The term "dues" includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or

sporting privileges or facilities, for any period of more than six days; and

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 1712.)

Treasury Regulations 43 (1941 ed.), promulgated under the Internal Revenue Code:

Sec. 101.24. Determination of Character of Club.—The purposes and activities of a club or organization *and not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic or sporting features is presumed to be included within the meaning of the phrase, "any social, athletic, or sporting club or organization", until the contrary has been proved, and the burden of proof is upon it. Every such club or organization, therefore, unless it falls within the express exemption of the Code (see section 101.30), must collect, return, and pay over the tax imposed by the Code, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact "social, athletic, or sporting" within the meaning of the Code and as defined in these regulations. If any such club or organization claims that it is not in fact "social, athletic, or sporting," it shall submit to the collector a copy of its charter or constitution and by-laws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted, the collector will determine, if he can do so, whether or not such club or organization comes within the provisions of the Code. If, however, the collector is in doubt as to whether or not the club or organization is "social, athletic, or sporting," he will refer the statement and accompanying papers to the Commissioner for decision. When a club or organization has been held not to be a "social, athletic, or sporting" club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organiza-

tion or operations or the purpose for which it was originally created. Collectors will keep a list of all clubs and organizations held not to be "social, athletic, or sporting" clubs or organizations, to the end that they may occasionally inquire into their status and ascertain whether the conditions upon which their exemption was predicated remain unchanged. If the collector decides that the club or organization comes within the provisions of the Code and the club or organization is not satisfied with his decision, it may request that the matter be referred to the Commissioner for a ruling.

Sec. 101.25. Social Clubs.—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization, it is a "social * * * club or organization" within the meaning of the Code. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization". Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt (See section 101.30).

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 55

THE DRUG AND CHEMICAL CLUB OF NEW YORK,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question is whether the facts support the finding of the Court of Claims (R. 17) that petitioner is a "social" club subject to the tax on dues and initiation fees imposed by Section 1710 of the Internal Revenue Code. The facts found by the court below (R. 6-17), which are undisputed, amply support its conclusion, and it is not necessary to repeat them here in detail.

The petitioner is a so-called luncheon club. In addition to dining facilities, the club maintains a spacious lounge attractively and comfortably furnished, a completely-equipped bar where alcoholic beverages are served, and special ladies' quarters. While the principal activity at the club is during the luncheon period, the club is open from Monday through Friday, exclusive of holidays, from 9:00 a.m. to 6:00 p.m. and club members and their guests may use the facilities of the club at any time during those hours. The Court of Claims found that the social features were a material, if not a major, aspect of the club's purpose and character. Whether a particular taxpayer is or is not a "social" club, as defined by the statute and the applicable regulations (Treasury Regulations 43 (1941 ed.), Secs. 101.24-101.25), ordinarily involves factual questions not warranting review by this Court. See *Duquesne Club* v. *United States,* 87 C. Cls. 483, certiorari denied, 306 U.S. 649; *Uptown Club of Manhattan* v. *United States,* 113 C. Cls. 422, certiorari denied, 338 U.S. 823; *Engineers' Club of Philadelphia* v. *United States,* 95 C. Cls. 42, certiorari denied, 316 U.S. 700.

Petitioner's main contention here is that the decision below is in conflict with other rulings of the Court of Claims. Obviously this is not a certiorari question. The Government submits that the decision below, turning upon the par-

ticular facts here involved, was correctly decided by the Court of Claims, and that no question warranting further review is presented.

Respectfully submitted,

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